

KENTUCKY PERSONNEL BOARD
MINUTES OF JUNE 14, 2016

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Vice Chairman Larry Gillis on June 14, 2016, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Larry B. Gillis, Vice Chairman
David B. Stevens, Member
Amanda Cloyd, Member
Brian J. Crall, Member
D. Brian Richmond, Member
Mark O. Haines, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Cynthia Perkins, Administrative Section Supervisor
Gwendolyn McDonald, Administrative Specialist

2. **READING OF THE MINUTES OF REGULAR MEETING HELD MAY 13, 2016**

The minutes of the last Board meeting had been previously circulated among the members. Chair Gillis asked for additions or corrections. Mr. Crall moved to approve the minutes, as submitted. Dr. Stevens seconded and the motion carried 5-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek announced that Ms. Connie Lashbrook, Administrative Specialist III, was off promotional probation and is doing a great job.

Mr. Sipek stated that he attended the UK Employment Law Seminar On June 10, 2016.

Mr. Sipek reviewed with the Board the criteria for selecting contract hearing officers in 2014 and advised they were up for a two-year renewal. The Governor's General Counsel, Hon. Steve Pitt, approved a two-year renewal for all ten hearing officers. Each hearing officer earns \$75 per hour. Mr. Crall asked if the agencies or Board gave feedback about the hearing officers. Mr. Sipek stated that at times Board members have been concerned with the length of the hearing officers' orders or the amount of time it takes to complete an order. Mr. Sipek responded that agencies seldom raise issues about hearing officers, but if there is an issue, it is addressed with the Board and/or the hearing officer as they arise.

Mr. Crall asked about the length of time it takes for an appeal to be processed. Mr. Sipek advised that the average duration varies, but the range is anywhere from six months to one and a half years. Mr. Sipek stated that at the request of a former Board member the staff used to keep track. After Ms. Morris retired, Mr. Sipek stopped that practice since no one ever commented on the information provided. Mr. Sipek stated, as an example, the KET case coming up on the July Agenda took approximately five years to go through the process, and would change the average duration dramatically. The Board attempts to keep appeals moving, but sometimes appeals are delayed at the request of one of the parties (i.e. scheduling issues, the possibility of settlement or mediation, motion practice, etc.) One purpose of the monthly status report is to ensure nothing falls through the cracks.

At the conclusion of Mr. Sipek's report, Chair Gillis called for the Personnel Cabinet's report.

4. Swearing in of newly elected Board members

New Board Member, D. Brian Richmond, appointed by Governor Matthew G. Bevin, was sworn in. The oath of office was administered by Boyce A. Crocker, General Counsel. Mr. Sipek welcomed Mr. Richmond to the Board. Chair Gillis introduced the Board members and staff.

5. PERSONNEL CABINET'S REPORT

Secretary Thomas Stephens and the Hon. Rosemary Holbrook were present for the Personnel Cabinet's report.

Ms. Holbrook stated that the 2017 Open Enrollment is coming up in October, but steps are already being taken now to address it. EEOC issued new Wellness Regulations, employee participation has to be voluntary. These changes will affect the Living Well program in 2017.

Secretary Stephens said the size and scope of the state's health insurance plan is tremendous with approximately 1.8 billion dollars in total claims. The plan includes not only state employees, but retirees (until Medicare eligible) and public school systems. The costs associated with the health plan have been controlled and is a significant benefit to state employees.

Secretary Stephens said the Personnel Cabinet will be the first Cabinet to execute a reorganization; administratively and by Executive Order. One step is the creation of an ombudsman office within the Personnel Cabinet to identify problems before they reach litigation.

Secretary Stephens commented that the June 30th payroll will be deferred until the beginning of FY17 which begins July 1, 2016.

6. **MOTIONS**

Melody Westerfield v. Cabinet for Health and Family Services

--Appellant's Motion to File Late Exceptions and Request for Oral Argument

--Appellee's Motion to Strike Appellant's Exceptions and Request for Oral Argument

Mr. Sipek stated that the justification for Appellant's motion is that she did not receive the Recommended Order, after it was mailed out. The Appellee filed a response. Copies of these motions were made available to the Board. Mr. Sipek stated that Appellant, Ms. Westerfield, was present, but counsel for Appellee, Hon. Blake Vogt was not present. However, the motion was not set to be done orally.

Mr. Richmond asked if Appellant was represented by counsel or if the Order was sent out with service. Mr. Sipek stated that the Order was sent out by regular mail on May 3, 2016. Ms. Westerfield came to the Board's office on or about June 2, 2016, and asked about her appeal. She received a copy of the Order and it is her position that is the first time she got the Order. Mr. Richmond asked if we had a certificate of service. Mr. Crocker advised that the Personnel Board is exempt pursuant to KRS 13B from using certified mail. Mr. Richmond stated that as an attorney this did not make sense to him. Mr. Crocker advised this has been the Board's practice for over twenty years. Mr. Sipek stated, before he came to the Board, that KRS 13B required certain documents to be mailed out by certified mail and included the Personnel Board. However, staff at that time at the Personnel Board asked for an amendment to take the Board out of the statute and it has been the practice since then. If the Board has problems with certain mailings that are returned to the Board, it would then be sent out certified and by first class mail. To Mr. Sipek's knowledge, there has not been a problem with Ms. Westerfield's mail, since no mail has been returned to alert the Board. Mr. Crall asked about e-mailing documents. Mr. Crocker said staff occasionally send documents by e-mail; Mr. Sipek added usually at the party's request if an e-mail address is provided.

Ms. Cloyd moved to accept Appellant's Motion to File Late Exceptions and Request for Oral Argument. Dr. Stevens seconded and the motion carried 5-1, with Mr. Haines opposing.

7. **ORAL ARGUMENTS - NONE**

8. **INTERIM ORDER**

A. **Emerson Adkins (Appeal No. 2014-219) et al. v. Energy and Environment Cabinet and Personnel Cabinet** [Interim Order -- Designated for Review by the Personnel Board pursuant to 101 KAR 1:365, Section 6(2)]

Hearing Officer Mark A. Sipek withdraws from case and shall abstain from further action in this case. The appeals to be assigned to a new hearing officer designated by the Board.

Mr. Sipek stated that, with the issues raised by the Hon. Paul Harnice during the fifth day of hearing, he has withdrawn from the *Adkins*' case. Specifically, Ms. Lynn Gillis, an Appointing Authority with the Office of General Administration and Program Support (GAPS), is married to Board Member Larry Gillis. Mr. Harnice advised Mr. Sipek that he was not aware of the relationship between Lynn and Larry Gillis, until it was pointed out by one of the Appellants. Since the Board employs the Executive Director and sets his salary it was expressed by Mr. Harnice that a conflict exists. Mr. Sipek stated that he never considered this a conflict, but he can see the Appellant's point.

Mr. Sipek stated that in the past, Mr. Gillis would recuse from any appeal that involved GAPS. Mr. Sipek stated General Counsel Andy Crocker is bound by the same regulation as himself and, therefore, the case cannot be assigned to him. Mr. Sipek stated that he did not feel it was fair for him to select a new hearing officer, but instead suggested that the Board assign a new hearing officer. Mr. Sipek stated that he is awaiting a decision from the Executive Branch Ethics Commission and the Ethics Hotline from the Kentucky Bar Association. Mr. Crall asked, since he does not know any of the hearing officers, how would he execute good judgment in assigning a hearing officer? Ms. Cloyd suggested selecting the hearing officer with the least amount of cases, as they are all qualified. Mr. Sipek suggested letting Ms. Perkins select a hearing officer, as there would not be that many volunteers due to the amount of time and work involved. Mr. Crocker stated that typically he and Mr. Sipek handle all pre-hearing conferences; however, neither he nor Mr. Sipek are involved in assigning hearing officers for evidentiary hearings, which is done by Ms. Perkins.

Mr. Crall stated that he does not see a conflict with either Mr. Sipek or Mr. Crocker hearing appeals as long as there is disclosure to the parties of any potential conflict and letting the parties decide whether to go forward. Mr. Crall stated that it was appropriate to follow the usual process assigning a hearing officer. Ms. Cloyd agreed with this suggestion, as well as Mr. Richmond.

Chair Gillis said that he did not want to get into the discussion about assigning a hearing officer; but wanted everyone to know that both the Executive Director and General Counsel were hired before he was elected to the Board. The Board annually approves whether Mr. Sipek or Mr. Crocker receive a pay increase. The Board has authority to give more than the increment given to state employees; however, the record reflects they never received any more or any less than other state employees. If the state employees did not get an increment, the Board did not award an increment and neither Mr. Sipek nor Mr. Crocker asked for one.

After some discussion, Mr. Crall moved to allow Ms. Perkins to follow usual procedures to get a new hearing officer. Dr. Stevens seconded and the motion carried 5-0, with Chair Gillis recusing because his wife is an Appointing Authority with GAPS.

9. **CONFLICT ISSUES FOR THE EXECUTIVE DIRECTOR AND
THE GENERAL COUNSEL**

- A. GAPS agencies (EEC, PPC and Labor Cabinet)
- B. Kentucky State Police
- C. Personnel Cabinet

Mr. Sipek stated that until the Board receives an opinion from the Ethics Commission, that he and Mr. Crocker should not serve as Hearing Officers on any cases involving the above agencies, which includes conducting pre-hearing conferences.

The Kentucky State Police has been included because Ms. Cloyd is an employee and Appointing Authority, which means she is involved in many of the employment decisions that are appealed with the Board.

The Personnel Cabinet has been included because Mr. Gillis is a high-level employee, although not an Appointing Authority. The best practice for the staff may be to step aside from Personnel Cabinet appeals.

This may involve contract hearing officers conducting pre-hearing conferences and evidentiary hearings for these agencies until at least until the August 2016 Board meeting.

As far as the *Adkins'* case, Mr. Sipek never thought of it being an issue for the staff because he believed any personal conflicts for Board members were addressed by way of recusal from either Mr. Gillis or Ms. Cloyd. The statute at least required being looked at and an outside opinion sought. Mr. Sipek stated he did not know whether a vote was needed, but would like some feedback from the Board members.

Mr. Crall was not opposed to staff doing the initial hearings. However, disclosing and letting the parties decide potentially saves a step. Mr. Sipek stated that one of his concerns was with unrepresented Appellants, who might raise an issue later in the process. Mr. Crall stated that it is the Appellant's decision whether or not to be represented and as long as it is disclosed and signed off on, they are taking the same responsibility for that decision, as well as their decision not to be represented. Disclosure gives the party the right to make informed decisions. Mr. Crocker stated there is minimal impact right now because not that many appeals are scheduled with these agencies before the August Board meeting.

Mr. Sipek stated he had nothing further on this issue.

10. **CLOSED SESSION**

Dr. Stevens moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Ms. Cloyd seconded. Chair Gillis stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 6-0. (10:30 a.m.)

Mr. Crall moved to return to open session. Dr. Stevens seconded and the motion carried 6-0. (11:20 a.m.)

11. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. **Joyce A. Fry v. Energy and Environment Cabinet & Stephanie Hayes (2015-264)**

Mr. Crall moved to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 5-0, with Chair Gillis recusing because his wife is an Appointing Authority in GAPS.

B. **Curtis Godchaux v. Cabinet for Health and Family Services (2015-281)**

Ms. Cloyd moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 6-0.

C. **Dave Jordan v. Tourism, Arts & Heritage Cabinet/Parks (2015-263)**

Ms. Cloyd moved to accept the recommended order dismissing the appeal. Mr. Crall seconded and the motion carried 6-0.

D. **Chris W. Jones v. Transportation Cabinet (2015-300)**

Mr. Crall moved to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 6-0.

E. **Melody Westerfield v. Cabinet for Health and Family Services (2015-190)**

Dr. Stevens, having noted Appellant's Motion to File Late Exceptions and Request for Oral Argument and Appellee's Motion to Strike Appellant's Exceptions and Request for Oral Argument, moved to defer this matter to the next Board meeting. Mr. Richmond seconded and the motion carried 6-0.

F. **Gary Wise v. Education and Workforce Development Cabinet (2015-079)**

Mr. Crall, having noted Appellee's Exceptions, Appellant's Response and Corrected Response, moved to defer this matter to the next Board meeting. Mr. Richmond seconded and the motion carried 6-0.

12. **Show Cause Order – No Response Filed – Appeal Dismissed**

Dr. Stevens moved to find that the Appellant had not responded to the show cause order and that the recommended order be accepted dismissing the appeal for failure to timely prosecute the appeal. Ms. Cloyd seconded and the motion carried 6-0.

A. **Christina Daugherty v. Department of Corrections (2014-167)**

13. **WITHDRAWALS**

Ms. Cloyd moved to accept the following withdrawal of appeals *en bloc* and to dismiss the appeals. Dr. Stevens seconded and the motion carried 6-0.

A. **Lee Anne Hendry v. Cabinet for Health and Family Services (2016-090)**

B. **Ramsey E. Ismaili v. Cabinet for Health and Family Services (2016-010)**

C. **Gary Patrick v. Transportation Cabinet (2016-095)**

14. **SETTLEMENTS**


Dr. Stevens moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Ms. Cloyd seconded and the motion carried 5-0, with Chair Gillis recusing because his wife is an Appointing Authority in GAPS.

A. **Tony E. Goodrich v. Transportation Cabinet (2016-065)**

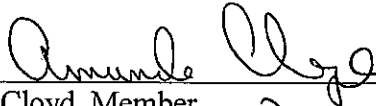
B. **James Todd Price v. Public Protection Cabinet (2015-275)**

15. **OTHER**

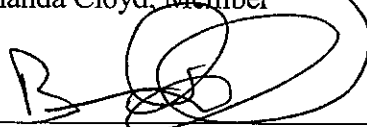
There being no further business, Dr. Stevens moved to adjourn. Ms. Cloyd seconded and the motion carried 6-0. (11:30 a.m.)



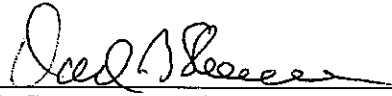
Larry Gillis, Vice Chairman



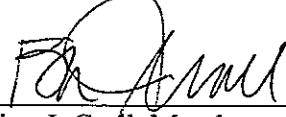
Amanda Cloyd, Member



D. Brian Richmond, Member



David B. Stevens, Member



Brian J. Crall, Member



Mark O. Haines, Member